Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

MARTIN P. RUTHERFORD and NANJA RUTHERFORD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Internal Revenue Service allowed to conceal a criminal investigation when a Taxpayer specifically asks the purpose why the information is being sought by the government?

2. Is the Internal Revenue Service allowed to conduct a secret criminal investigation of a Taxpayer under the auspice of a civil investigation?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioners: Martin Rutherford, an individual.

Nana Rutherford an individual.

Respondent: United States of America.

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IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN AND NANJA RUTHERFORD,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATED COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN RUTHERFORD and NANJA RUTHERFORD, Petitioners, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

Petitioners, Martin and Nanja Rutherford were indicted on December 8, 1999 for violation of 26 U.S.C. §7206(1) - making and subscribing a false income tax return (count one); and 26 U.S.C. §7203 - failure to file income tax return (count two). The indictment was based upon evidence obtained by the Internal Revenue Service (hereinafter the "IRS") during a criminal investigation disguised as a civil investigation in violation of 5 U.S.C. §552a(e)(3). That statute requires disclosure of the principal purpose or purposes for which the information is intended to be used. The Rutherfords attempted to suppress this evidence but were unsuccessful. Trial commenced on September 13, 2000. After 15 days, a jury found Martin and Nanja Rutherford , guilty on both Counts 1 and 2. The Rutherfords appealed to the Ninth Circuit Court of Appeals on March 13, 2001. On April 29, 2002, the Court of Appeals for the Ninth Circuit affirmed the Rutherfords' conviction. The Rutherfords filed a Petition for Rehearing with Suggestion for Rehearing En

Banc on May 13, 2002. On May 30,20 02, the Ninth Circuit Court of Appeals denied the petition for rehearing.

JURISDICTION

Subject matter jurisdiction for the United States District Court for the District of Nevada is found in Sections 7206(1), and 7203 of Title 26, United States Code as amended. Venue is proper pursuant to Rule 18 of the Federal Rules of Criminal Procedure. Subject matter jurisdiction for the Court of Appeals for the Ninth Circuit was invoked under 28 U.S.C. §1291. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

5 § 552a. Records maintained on individuals

(e) Agency Requirements. - Each agency that maintains a system of records shall -

> (3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual -

26 § 7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the

case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

26 § 7206. Fraud and false statements

Any person who -

(1) Declaration under penalties of perjury Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

STATEMENT OF THE CASE

a. General Background and Description

Martin Rutherford is a Chiropractor who founded and manages with his wife, Nanja, a chiropractic business known as the Chiropractic Arts Center. Prior to 1992, the Rutherfords had consistently filed their federal income tax returns. During 1992, a number of questions arose concerning the deductibility of business management courses sponsored by the Church of Scientology and the propriety of a previously conducted audit for the years 1988-1990. Due to the Rutherfords' affiliation with the Church of Scientology, the Rutherfords' federal income tax returns for the years 1988-1990 were chosen for audit. Because of confusion related to the 1988-1992 audit and the current deductibility of Scientology sponsored management courses, the Rutherfords sought the legal advise of two tax attorneys (Pono Bognus and Jerry Aurillo). At the request of the IRS, Mr. Bognus filed the 1992 return. A dispute exists as to whether IRS employees filled in zeros on the return in order to substantiate their criminal case. Because of lingering

problems related to the same issues, Mr. Arrillo recommended that the 1993 return not be filed until a resolution was reached on the prior years' returns.

b. The 1988-1990 federal income tax audit.

1. Introduction.

A number of factors impacted the Rutherfords' prosection for the years 1992 and 1993. Most notable was their treatment by the IRS due to their affiliation with the Church of Scientology. As a result of that affiliation, the Rutherfords were subjected to an audit for the years 1988-1990. A number of errors occurred during that audit that incorrectly increased taxes due for that period. During 1993, the errors were discovered and disclosed to the IRS. Refunds due from the incorrect audit could be carried forward and to reduce taxes due for the 1992 and 1993 tax years. The history of the 1988-1990 audit is important as it explains why compliance with 5 U.S.C. §552a(e)(3) is necessary to protect taxpayers from being improperly targeted by the IRS.

2. Retaliation for the Rutherfords' affiliation with the Church of Scientology.

During the initial meeting with IRS concerning the 1988-1990 audit, Dr. Rutherford was threatened by Agent Valenzuela with criminal prosecution if he did not fully agree with adjustments. At the time, Agent Valenzuela had not completed the audit. In fact, all that Agent Valenzuela knew was that the Rutherfords were affiliated with the Church of Scientology. Agent Valenzuela admittedly predetermined substantial audit adjustments simply because the Rutherfords were Scientologists. Those adjustments included the disallowance of all deductions taken for payments made to the Church of Scientology (both donations and expenditures for business management courses). Shocked by Agent Valenzuela's threats, Dr. Rutherford complained directly to IRS senior management. As a result of that complaint, the Rutherfords suffered retaliation including, but not limited to, an incorrect audit determination for the years 1988-1990; further threats of criminal prosecution; improper collection activity; and finally criminal prosecution.

3. Undisclosed conflicts.

Obviously, Agent Valenzuela was prejudiced against the Rutherfords, and all other individuals affiliated with the Church of Scientology. For that reason alone, Agent Valenzuela should not have participated in the 1988-1990 audit. Another conflict was equally shocking. Mr. Valenzuela had worked for the Rutherfords' CPA's, Bernard & Vogler, immediately prior to accepting employment with the IRS. In other words, Mr. Valenzuela concurrently worked for Bernard & Vogler while the Rutherfords sought and received that firm's tax advice. Agent Valenzuela should not have audited any Bernard & Vogler clients that were firm clients at the time that he was employed by that firm. Neither, the IRS nor Bernard & Vogler disclosed the conflict to the Rutherfords.

4. Audit done without the 1988 return.

The 1988-1990 audit was a sham. At trial, no less than four tax experts determined that the Rutherfords were over assessed as a result of the audit by more than $150,000.00. No experts contradicted this testimony. In fact, during trial Agent Valenzuela admitted that he audited at least one tax year (1988) without having the income tax return in his possession. Also during trial, Agent Valenzuela admitted that he had denied all of the Scientology expenditures because that was the position taken by the IRS at the time. Those deductions included expenditures for management courses sponsored by the Church of Scientology. Those deductions were proper business expenditures under IRC §162 and/or deductible donations. In the audit file, there were notations made by the IRS' summary witness, John Breathwaite, that a substantial amount of the Scientology expenditures were deductible. None the less, the IRS refused to correct their audit, and instead, retaliated with extensive collection activity (e.g., liens and levies upon the Rutherfords' assets). Effectively, the Rutherfords were liened and levied even though the IRS owed them money.

5. The audit work papers were grossly deficient.

During trial, the Rutherfords produced four accounting and tax experts each with substantial experience and exceptional reputation. The Rutherfords' experts determined that the IRS's audit was, in fact, improper, and had resulted in a substantial overpayment.

Also significant were "summary adjustments". The "summary adjustments" were nothing more than the unexplained differences between the tax return and accounting records . A difference existed because the accounting records were maintained on an "accrual basis, while the tax returns were on a "cash basis". Moreover, the "summary adjustment" was based upon "draft" documents prepared by Bernard & Vogler, Agent Valenzuela's previous employer, Obviously, draft financial records should not have been provided to the IRS by Bernard & Vogler, but were based upon their close relationship with Agent Valenzuela. As is discussed above, the IRS auditor, Phil Valenzuela, had unlimited access to the Rutherfords' accounting records while he worked for Bernard & Vogler, and thereafter, because he had a special relationship with those Accountants. During 1992, as a result of the 1988-1990 audit results, the Rutherfords paid, either directly or indirectly through improper levies, approximately $180,000.

6. IRS Settles with the Rutherfords for 1988-1990.

After being threatened by Mr. Valenzuela with criminal prosecution and at the behest of Bernard & Vogler, the Rutherfords agreed to a settlement with the IRS for the years 1988-1990. Under the terms of the settlement, the Rutherfords immediately paid $50,000, and owed approximately $111,000 to the IRS. Interest and penalties were waived. Also, the IRS agreed that the Rutherfords could pay the balance (approximately $111,0000) over a reasonable term under a payment plan. Immediately after reaching this agreement, the IRS levied all of the Rutherfords' bank accounts. The levies devastated the working capital of the Chiropractic Arts Center. At the time

that the Rutherfords settled with the IRS, they did not know about Mr. Valenzuela's conflict with Barnard & Vogler; that negotiations were ongoing between the IRS and the Church of Scientology concerning the deductibility of expenditures made as donations or for business management courses; or that the audit prepared by Mr. Valenzuela was grossly defective. The Rutherfords were simply told to pay or go to jail. The Rutherford settlement agreement was subsequently breached by the Government (e.g., additional interest and penalties were assessed against the Rutherfords and they were not allowed to make payments under a payment plan).

Eventually, the Rutherfords learned about Mr. Valenzuela's conflict; deficiencies in the audit; and that the Scientology deductions were proper. When the Rutherfords brought this to the attention of IRS management, the IRS requested a meeting to resolve the parties' disputes. Apparently agreeing that the Rutherfords had overpaid their taxes, It was common knowledge that if the overpaid taxes had been properly applied to the Rutherfords' 1992 and 1993 tax years, no taxes, interest or penalties would have been due for those years. Instead of acknowledging that refunds were due to the Rutherfords, the IRS simply ignored amounts due to the Rutherfords and continued improper collection activity. In a good faith attempt to resolve the dispute, the Rutherfords hired 2 tax attorneys (Pono Bognus and Jerry Aurillo). As the IRS had done, Mr. Bognus caused filed a return for 1992 and the 1993 return was placed on hold pending an outcome of the earlier disputes. Although not allowed to be admitted as evidence at trial, the IRS told the Rutherfords that the government would file their 1993 return. Believing that the government was acting in good faith, the Rutherfords agreed to have the IRS prepare their return for 1993. The Rutherfords relied upon the IRS representations for the years 1992 and 1993. Subsequently, the Rutherfords were indicted for filing a zero return for 1992 and not filing a return for 1993.

7. The IRS did not disclose to the Rutherfords that it had made a retroactive settlement with the Church of Scientology.

Not only did the IRS fail to disclose that they were conducting a criminal investigation under the auspice of civil collection activity, they failed to adjust for amounts determined to be properly deductible as business expenses or donations under a retroactive settlement agreement reached with the Church of Scientology. During 1993 while aggressive collection activity was being pursued against the Rutherfords, the IRS reached a private settlement with the Church of Scientology. That settlement was retroactive. Pursuant to the settlement, the IRS issued Revenue Ruling 93-73 which allowed Scientology donations as deductible expenditures. Business courses offered by the Church of Scientology were already deductible, under I.R.C. §162. In any event, all of the Rutherfords' Scientology related expenditures were deductible either as IRC §162 expenditures or as charitable donations. Because of the settlement, it was the expert opinion of Messrs. Orgill and Schlingheyde[1] that the previous audit and the related settlement should have been adjusted recognizing a credit for the previously disallowed Scientology expenditures made during 1988- 1990. Instead of properly adjusting the Rutherfords accounts, the IRS aggressively sought payment for the total amount assessed by Mr. Valenzuela.

8. IRS misrepresents its intent to criminally prosecute the Rutherfords.

Eventually, the Rutherfords and the IRS met in an attempt to resolve their disputes. During the meetings that occurred, the IRS did a number of things which led the Rutherfords to believe that they did not owe taxes for 1992 and 1993. For example, the IRS filed a return for the Rutherfords for 1992 that showed no taxes were due (a "zero

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[1] Mr. Schlingheyde is a certified public accountant hired by the Rutherfords with an advanced degree in taxation and nearly 30 years of public accounting experience.

return"). Moreover, the IRS agreed to file the Rutherfords 1993 return. That evidence was not allowed at trial. IRS notices were received which confirmed that no taxes were due. While acting as if they were sympathetic to the Rutherfords' predicament, the IRS was actually conducting a secret criminal investigation through its civil collection division. None the less, having previously been threatened by Mr. Valenzuela, Dr. Rutherford specifically asked IRS agents and/ or officers what the purpose was of information requested by the IRS (e.g., why haven't you filed your 1993 return, why did you file a zero 1992 return). Instead of responding honestly, the IRS concealed their criminal investigation.

9. Trial in U.S. District Court

Trial commenced on September 13, 2000. After 15 days of trial, a jury found both the Defendants, Martin and Nanja Rutherford , guilty of violating 26 U.S.C. §7206(1) - making and subscribing a false income tax return (count one); and 26 U.S.C. §7203 - failure to file income tax return (count two). Counts 1 and 2. The evidence obtained after Dr. Rutherford's specific inquiries regarding the IRS's purpose for requesting additional information was the very evidence used to convict the Rutherfords. In particular, the government used a tape of a meeting between Dr. Rutherford and the IRS. That tape was taken out of context and used to convict the Rutherfords.

REASONS FOR GRANTING WRIT

I. THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURTS JUDGMENT OF CONVICTION OF MARTIN AND NANJA RUTHERFORD

a. Facts of the case.

This case involves retaliation against Taxpayers who discovered and disclosed IRS errors involving an audit conducted solely because of their affiliation with the Church of Scientology. In fact, the Rutherfords are owed refunds which have been improperly disallowed. The retaliation visited upon the Rutherfords includes improper tax assessments, liens, levies, and eventually the criminal prosecution of the Rutherfords. The IRS misconduct disclosed by the Rutherfords included retaliation against Scientologists; criminal threats made by IRS agents; unsubstantiated audit adjustments; conflicts improperly used to justify improper audits; illegal seizure of assets; and intentional breaches of settlement agreements. The net affect of the Rutherfords' conviction is to discourage taxpayers who legitimately disclose improper conduct and properly request refunds. A number of errors occurred during trial. The most notable was allowing a tape recorded meeting between the IRS and Dr. Rutherford to be used at trial. Undisputedly, the Rutherfords provided documents to the IRS after requesting verification of the IRS' purpose which was intentionally concealed from them (criminal investigation).

b. The IRS admittedly violated disclosure statutes requiring suppression of evidence improperly obtained by the IRS.

1. Introduction.

The real issue in this case concerns the IRS's obligation to disclose its intention to criminally prosecute taxpayers, while misrepresenting that the information they are seeking is for civil collection purposes. The Ninth Circuit Court recognized the correct rule, but misapplied it to

the facts of this case. Specifically, the Ninth Circuit Court ruled as follows:

> The Rutherfords claim, that under *United States v. Sourapas*, 515 F.2d 295, 298 (9th cir. 1975), the both the tape-recorded interview and the evidence obtained during and as a result of the Ruiz interrogation must be suppressed because the IRS violated its own procedures. However, this argument has no merit. *Sourapas* did support the Rutherfords argument, holding that "any information obtained from Sourapas' personal records or answers to questions should be suppressed by reason of Saetta's failure to comply with the [IRS] regulations,"*Sourapas*, 515 F.2d at 298, but the holding in *Sourapas* has long been superseded. **The United States Supreme court held that evidence obtained in violation of IRS regulations is admissible at the criminal trial of a taxpayer, so long as there was no constitutional or statutory violation.** *United States v. Caceres*, 440 U.S. 741, 754-56 (1979); accord *United States v. Snowadzki*, 723 F.2d 1427, 1430-31 (9th Cir. 1984) ("Absent unusual circumstances, the exclusionary rule does not apply when IRS agents violate internal regulations, without also infringing on constitutional or statutory rights"); see also *United States v. Appoloney*, 761 F.2d 520, 522 (9th Cir. 1985) (stating that "the Court [in Caceres] held that absent any constitutional or statutory violation the exclusionary rule was inapplicable. Thus, the continuing validity of our holding in *Sourapas* is questionable. Subsequently, [in *Snowadzki*] we have held that '[absent unusual circumstances, the exclusionary rule does not apply when IRS agents violate internal regulations, without also infringing on constitutional or statutory

> rights'" (citations omitted). Even if the IRS violated its own regulations, the evidence remains admissible because the actions of the IRS agents did not violate the Rutherfords' statutory or constitutional rights. See *Caceres*, 440 U.S. at 754-756; *Snowadzki*, 723 F.2d at 1430-31. [Emphasis added].

See, Appendix , Memorandum Decision of the Ninth Circuit.

Initially, the Rutherfords were audited because of their affiliation with the Church of Scientology. When threatened, the Rutherfords complained to appropriate IRS officials. The complaint offered no protection as the audit continued eventually resulting in enormous damage to the Rutherfords'. Substantial assessments were made, followed by illegal liens, levies and eventually criminal convictions.

None of this would have occurred had the IRS complied with the "Disclosure of Rights of Taxpayer's Act." (5 U.S.C. §552a(e)(3)). Under that statute, the IRS is required to disclose how it is using information it requests and is to be provided by Taxpayers. When the Rutherfords attempted to meet to discuss the errors with the 1988-1990 audit, Dr. Rutherford specifically asked if the government had any ulterior motive, other than resolving the civil dispute. The government admittedly refused to answer and in doing such violated the Disclosure of Rights of Taxpayer's Act (5 U.S.C. §552a(e)(3)). Information that was provided in violation of that act should have been excluded (e.g., tape recorded meetings of the Rutherfords and IRS Agents or Revenue Officers). Nearly all of the evidence used at trial was obtained in direct violation of the "Disclosure of Rights of Taxpayers' Act". The Ninth Circuit erred in failing to recognize blatant violations of "statutes" as discussed in *Caceres*, supra.

2. <u>Civil Division of the Internal Revenue Service provided the Rutherfords' financial information to the Criminal Investigative Division, without proper disclosure and after specific inquiry as to the same by Dr. Rutherford.</u>

The IRS Criminal Investigative Division ("CID") used the Civil Collections Division to conduct a secret criminal investigation of the Rutherfords, without proper disclosure. Disclosure and Miranda warnings are required when substantial constitutional or statutory rights are at issue. *United States v. Sourapas*, 515 F.2d 295 (9th Cir. 1975) at 297, n2, quoting press release covering IR-949. The Disclosure of Rights of Taxpayers Act provides in pertinent part as follows:

> **Disclosure of rights of taxpayers.** Act Nov. 10, 1988, P.L. 100-647, Title VI, Subtitle J, § 6227, 102 Stat. 3731, provides:
>
> (a) In general. The Secretary of the Treasury shall, as soon as practicable, but not later than 180 days after the date of the enactment of this Act, prepare a statement which sets forth in simple and nontechnical terms-
>
> (1) the rights of a taxpayer and the obligations of the Internal Revenue Service (hereinafter in this section referred to as the "Service") during an audit;
>
> (2) the procedures by which a taxpayer may appeal any adverse decision of the Service (including administrative and judicial appeals);
>
> (3) the procedures for prosecuting refund claims and filing of taxpayer complaints; and
>
> (4) the procedures which the Service may use in enforcing the internal revenue laws (including assessment, jeopardy assessment,

levy and distraint, and enforcement of liens.

Likewise, 5 U.S.C. §552a(e)(3) provides in pertinent part as follows:

> (3) inform each individual whom it asks to supply information, on the form which is uses to collect the information or on a separate form that can be retained by the individual–
>
> (A) the authority (whether granted by statute, or by executive order of the president) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;
>
> (B) the principal purpose or purposes for which the information is intended to be used;
>
> (C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and
>
> (D) the effects on him, if any, of not providing all or any party of the requested information;
>
> ...

During trial IRS agents/officers admitted that it did not comply with the statutory mandate to provide a taxpayer with a notice of his or her rights.

3. <u>"Caceres" requires exclusion of the tape and related evidence because the Rutherfords' statutory rights were not properly disclosed</u>.

Essentially, the Ninth Circuit ruled that the IRS's conduct was proper under *United States v. Caceres*, 440 U.S. 741-754-755 (1979). The *Caceres* argument does not apply as Constitutional and Statutory violations do exist and were violated (right to counsel, right against self-incrimination, and rights under the 1974 Privacy Act and related statutes enacted thereafter). IRS employees admitted that they violated the statutory mandate to disclose to taxpayers their

rights after Dr. Rutherford raised the question. Since the disclosure statute was violated, the tape was improperly obtained and any subsequently obtained evidence should have been excluded.

What makes this case particularly disturbing is that IRS regulations explicitly prohibit a revenue agent from developing a criminal case against a taxpayer under the guise of a civil investigation. *United States v. Powell*, 835 F.2d 1095, 1100 n.12 (5th Cir. 1988) (citing Internal Revenue Manual, § 9311.83(1)). In this case, Revenue Agents used a civil collection interview to collect evidence for a criminal prosecution against the Rutherfords. If the IRS had complied with its statutory obligation to disclose, the Rutherfords would not have been so willing to discuss their civil tax issues with the government nor provide other evidence.

Since the Rutherfords' statutory right to a truthful disclosure was violated, the Ninth Circuit Court's ruling directly conflicts with the Ninth Circuit Court's own opinion (*Sourapas*, *supra*), the Supreme Court's Opinion (*Caceres*, supra), and substantially affects a rule of national application in which there is an overriding need for national uniformity. The IRS should not be allowed to violate disclosure statutes designed to protect taxpayers. This is particularly true when Taxpayers specifically ask for what purpose the information sought by the IRS is going to be used. The reason that the IRS must comply with disclosure statutes is that the IRS wields tremendous power.

CONCLUSION

The IRS prosecuted the Rutherfords with improperly obtained evidence. The criminal prosecution was necessary to obfuscate the Rutherfords' disclosure of improper conduct by Revenue Agent Valenzuela (criminal threats, conflicts with his previous employer, unsubstantiated audit adjustments, improperly disallowing Scientology expenditures that were legitimate deductions). By disguising their inquiry as civil, the Rutherfords were not afforded rights specifically

available to them under the Privacy Act of 1974. Dr. Rutherford undisputedly inquired as to what the information requested by the IRS would be used for. The IRS concealed the fact that the information was being used for its criminal investigation. All evidence subsequently obtained, should have been excluded under this Court's ruling in *Caceras*, supra. Had proper disclosures been made, the Rutherfords would have been able to properly protect themselves. That protection was particularly important in this case as the government was improperly assessing taxes against individuals associated with the Church of Scientology, improperly threatening Taxpayers with criminal prosecution in order to obtain civil settlements, intentionally breaching civil settlements, and then prosecuting Scientology affiliates with evidence obtained in violation of statutes specifically designed to protect Taxpayers. The Rutherfords over paid their taxes, tried to cooperate with the IRS, and as a result were criminally prosecuted by the IRS.

WHEREFORE, Petitioners Martin and Nanja Rutherford request of this Court that it GRANT this Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED,

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(Any footnotes trail end of each document)

No. 01-10164, No. 01-10172

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

NANJA RUTHERFORD,
Defendant - Appellant.

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

MARTIN RUTHERFORD,
Defendant - Appellant.

March 12, 2002, Argued and Submitted,
San Francisco, California

April 29, 2002, Filed

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For MARTIN RUTHERFORD, Defendant - Appellant (01-10172): Kevin J. Mirch, Esq., MIRCH & MIRCH, Reno, NV.

JUDGES:
Before: BRUNETTI, LEAVY and T. G. NELSON, Circuit Judges.

OPINION:

MEMORANDUM *

Martin and Nanja Rutherford ("the Rutherfords") appeal their convictions by a jury for making and filing false income tax returns for 1992, and for failing to file income tax returns for 1993. Specifically, they argue that the district court erred in denying their motions to suppress evidence, in denying their Rule 29 motions for judgments of acquittal, and in making inconsistent evidentiary rulings throughout the trial. We disagree, and affirm the district court's order entering judgments of conviction against the Rutherfords. Because the parties are familiar with the facts, we will not recite them except as necessary

I.

We review *de novo* a district court's denial of a motion to suppress and its application of the law. *United States v. Murillo, 255 F.3d 1169, 1174 (9th Cir. 2001)*. The district court's factual findings underpinning its denial of a motion to suppress are reviewed for clear error. *Id.*

The Rutherfords argue that IRS Special Agent Lilia Ruiz interrogated them at their offices without identifying herself or informing them of their constitutional rights, and that all evidence obtained as a result of the interrogation violated their Fifth Amendment rights and was thus inadmissible. The Rutherfords also argue that a tape recorded interview of Martin Rutherford by another IRS agent should be suppressed because the IRS purported to conduct it as part of a civil investigation, when in fact the case had already been referred to the criminal division of the IRS. These arguments have no merit.

The United States Supreme Court held that an IRS agent need not provide *Miranda* warnings to a individual under IRS investigation before questioning unless the individual was in custody or "special circumstances" were present "such as to overbear [the individual's] will to resist and bring about confessions not freely self-determined." *Beckwith v. United States, 425 U.S. 341, 347-48, 48 L. Ed. 2d 1, 96 S. Ct. 1612 (1975)* (quoting *Rogers v. Richmond, 365 U.S. 534, 544, 5 L. Ed. 2d 760, 81 S. Ct. 735 (1961))*. There is no evidence that the meeting between Ruiz and the Rutherfords was custodial in nature, nor were "special circumstances" involved so as to make the evidence the Rutherfords wish to suppress coerced or otherwise "not freely determined." *See Beckwith, 425 U.S. at 347-48.* Therefore, Ruiz was not required to *Mirandize* the Rutherfords, and the meeting did not trigger their constitutional rights against self-incrimination or right to counsel. Accordingly, any evidence obtained as a result of this meeting was properly admitted.

The Rutherfords argue that the taped interview should be suppressed because the IRS had already referred the Rutherfords' case from its civil division to its criminal division, and that once a case is referred from the IRS's civil department to its criminal division, under the IRS manual and *Crystal v. United States, 172 F.3d 1141 (9th Cir. 1999)*, the IRS is required to suspend all civil auditing activities. However, the district court found that the tape recording was made several months before the IRS referred the case to its criminal division, and there is no evidence indicating that the district court's finding was clearly erroneous.

The Rutherfords claim that, under *United States v. Sourapas, 515 F.2d 295, 298 (9th Cir. 1975)*, the both the tape-recorded interview and the evidence obtained during and as a result of the Ruiz interrogation must be suppressed because the IRS violated its own procedures. However, this argument has no merit. *Sourapas* did support the Rutherfords argument, holding that "any information obtained from Sourapas' personal records or answers to questions should be suppressed by reason of Saetta's failure to comply with the [IRS] regulations," *Sourapas, 515 F.2d at 298*, but the holding in *Sourapas* has long been superceded. The United States Supreme Court held that evidence obtained in violation of IRS regulations is admissible at the criminal trial of a taxpayer, so long as there was no constitutional or statutory violation. *United States v. Caceres, 440 U.S. 741, 754-56, 59 L. Ed. 2d 733, 99 S. Ct. 1465 (1979); accord United States v. Snowadzki, 723 F.2d 1427, 1430-31 (9th Cir. 1984)* ("Absent unusual circumstances, the exclusionary rule does not apply when IRS agents violate internal regulations, without also infringing on constitutional or statutory rights"); *see also United States v. Appoloney, 761 F.2d 520, 522 (9th Cir. 1985)* (stating that "the Court [in *Caceres*] held that absent any constitutional or statutory violation, the exclusionary rule was inapplicable. Thus, the continuing validity of our holding in *Sourapas* is questionable. Subsequently, [in *Snowadzki*] we have held that 'absent unusual circumstances, the exclusionary rule does not apply when IRS agents violate internal regulations, without also infringing on constitutional or statutory rights'") (citations omitted). Even if the IRS violated its own regulations, the evidence remains admissible because the actions of the IRS agents did not violate the Rutherfords' statutory or constitutional rights. *See Caceres, 440 U.S. at 754-56; Snowadzki, 723 F.2d at 1430-31.*

II.

A trial court's ruling on a Rule 29 motion for acquittal is reviewed de novo. *United States v. Ruiz-Lopez, 234 F.3d 445, 447 (9th Cir. 2001).* We must review the evidence in the light most favorable to the government to determine whether any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt. *United States v. Pacheco-Medina, 212 F.3d 1162, 1163 (9th Cir. 2000).* We will not set aside the findings of the trier of fact unless they are clearly erroneous. *United States v. Marchini, 797 F.2d 759 at 766.*

Examining the evidence in the light most favorable to the government, it is clear that the government met its burden of proving that the Rutherfords earned enough gross income to be required to file a tax return under *26 U.S.C. § 6012* by showing that the gross receipts of their chiropractic practice exceeded the statutory minimum.

The Rutherfords also argue that their Rule 29 Motion should have been granted because they relied on the advice of counsel and on correspondence from the IRS when they determined that they owed no taxes for 1992 and 1993. Reliance on the advice of a tax professional does not constitute a complete defense, but is a factor that the trier of fact may consider on the issue of willfulness. *United States v. Ibarra-Alvarez, 830 F.2d 968, 973 (9th Cir. 1987).* However, the jury considered the evidence on this issue and rejected the defense. The government offered a great deal of credible evidence showing that the Rutherfords knew that they owed taxes and acted willfully in violating the tax laws in 1992 and 1993. Viewing this evidence in the light most favorable to the government, we conclude that the government met its burden of proving that the Rutherfords acted willfully.

III.

We review a district court's evidentiary rulings for abuse of discretion. *Murillo, 255 F.3d at 1174; United States v. Alatorre, 222 F.3d 1098, 1100 (9th Cir. 2000).* Such rulings must be reversed for an abuse of discretion only if such nonconstitutional error more likely than not affected the verdict. *United States v. Ramirez, 176 F.3d 1179, 1182 (9th Cir. 1999).*

The Rutherfords have appealed a number of the district court's evidentiary rulings, alleging various errors. Generally, the district court controlled the scope of the Rutherfords'

cross-examination of government witnesses tightly, often sustaining government objections for irrelevance or exceeding the scope of direct examination. However, we could find no instance where the court abused its discretion.

AFFIRMED.

Footnotes

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case Number CR-N0990159-ECR (RAM)

UNITED STATES OF AMERICA

v.

NANJA RUTHERFORD

Entered March 5, 2001

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT:
XX was found guilty on count(s) ONE (1) & TWO (2) of Indictment filed 12/8/99 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
26:7206(1)	Making & Subscribing a False Income Tax Return	Dec, 1993	1
26:7203	Failure to File Income Tax Return	Dec, 1993	2

The defendant is sentenced as provided in pages 2 through **7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of

any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 530-68-1438

Defendant's USM No: 34668-048

Defendant's Residence Address:
4830 Golden Springs Drive
Reno, NV

Defendant's Mailing Address:
Same

February 23, 2001
Date of Imposition of Judgment

Signature of Judicial Officer

EDWARD C - REED, JR., SENIOR USDJ
Name and Title of Judicial Officer

March 2, 2001
Date

**Each separate page is signed & dated by the presiding judicial officer

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of FIVE (5) MONTHS as to Count I, and for a total term of FIVE (5) MONTHS as to Count 2, to run concurrently with the sentence imposed on Count I

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:.
X at 10:00 A.. M. on April 12, 2001

EDWARD C. REED. JR., SENIOR USDJ
Dated this 2 day of March, 2001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of ONE (1) YEAR as to Count I, and for a term of ONE (1) YEAR as to Count II, to run concurrently to the supervised release term imposed on Count I

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

XX The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future-substance abuse. (Check if applicable.)

XX The defendant shall not possess a firearm as defined in 18 U.S.C. 921. (Check, if applicable.)

If this judgment imposes a line or a restitution obligation, It shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the

commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

SEE ADDITIONAL SPECIAL CONDITIONS OF SUPERVISED RELEASE ON PAGE 4

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete Written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons:

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or

administered:

9) the defendant shall not associate with any persons engaged In criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer:

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risk that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SPECIAL CONDITIONS
OF SUPERVISED RELEASE

Defendant shall submit to the search of his person, and any property, residence or automobile under his control by the probation officer, or any other authorized person under the immediate and personal supervision of the probation officer without a search warrant to ensure compliance with all conditions of release.

Defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or negotiating or

consummating any financial contracts, without the approval of the probation officer.

Defendant shall cooperate with and arrange with the Internal Revenue Service to pay all past and present taxes and penalties owed, and file timely, accurate and lawful income tax returns and show proof of same to the probation officer. Defendant shall, within ninety (90) days, file correct and accurate income tax returns for the years 1994 and 1995.

Defendant shall make restitution in the amount of $141,812.75, to be paid jointly and severally with co-defendant Martin P. Rutherford. Said restitution. shall be payable, in full, within six (6) months after her release from incarceration.

Defendant shall be confined to home confinement with electronic monitoring, for a period of FIVE (5) MONTHS, commencing immediately after her release from incarceration according to the directions and schedule to be set by her supervising probation officer, and shall pay all costs incurred for the electronic monitoring.

Defendant shall pay a fine in the amount of $3,000.00, individually, payable within six (6) months after her release from incarceration.

Defendant shall pay costs of prosecution in the amount of $2,637.00, payable jointly and severally with the co-defendant Martin P. Rutherford, and payable within six (6) months after her release from incarceration.

Defendant shall provide the probation officer access to any requested financial information, including personal income taxes, authorization for release of credit information, and any other business financial information in which the defendant has a control or interest.

Dated this 2 day of March, 2001

EDWARD C. REED, JR., SENIOR USDJ

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$ 75.00	$ 3,000.00	$

Dated this 2 day of March, 2001

EDWARD C. REED, JR, SENIOR USDJ

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A XX Lump sum payment of $ 75. 00 due immediately, balance due

E XX Special instructions regarding the payment of criminal monetary penalties: The $3,000 fine shall be payable within six (6) months after defendant's release from incarceration; the $2,637.00 as costs of prosecution shall also be payable within six (6) months after defendant's release from incarceration, jointly and severally with co-defendant Martin P. Rutherford.

Dated this 2 day of March, 2001

EDWARD C. REED, JR., SENIOR USDJ

STATEMENT OF REASONS

XX The court adopts the factual finding and guideline application in the presentence report except (see attachment if necessary): SEE TRANSCRIPT

Guideline Range Determined by the Court.
Total Offense Level: 12
Criminal History Category: I
Imprisonment Range: 10 to 16 months
Supervised Release Range: 0 to 1 year
Fine Range: $ 3,000 to $ 30,000

Total Amount of Restitution: $ $ 141 ,812.75 jointly and severally with co-defendant

XX The sentence is within the guideline range. that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

Dated this 2 day of March, 2001

EDWARD C. REED, JR., SENIOR USDJ

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case Number CR-N0990159-ECR (RAM)

UNITED STATES OF AMERICA

v.

MARTIN P. RUTHERFORD

Entered March 5, 2001

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT:
X was found guilty on count(s) ONE (1) & TWO (2) of Indictment filed 12/8/99 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
26:7206(1)	Making & Subscribing a False Income Tax Return	Dec, 1993	1
26:7203	Failure to File Income Tax Return	Dec, 1993	2

The defendant is sentenced as provided in pages 2 through **7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of

any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. 140-44-3218

Defendant's USM No: 34667-048

Defendant's Residence Address:
4830 Golden Springs Drive
Reno, NV

Defendant's Mailing Address:
Same

February 23, 2001
Date of Imposition of Judgment

Signature of Judicial Officer

EDWARD C. REED, JR., SENIOR USDJ
Name and Title of Judicial Officer

March 2, 2001
Date

**Each separate page is signed & dated by the presiding judicial officer.

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XX The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:.
XX at 10:00 A. M. on April 12, 2001

Dated this 2 day of March, 2001
EDWARD C. REED, JR., SENIOR USDJ

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of ONE (1) YEAR as to Count I, and for a term of ONE (1) YEAR as to Count II, to run concurrently to the supervised release term imposed on Count I

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XX The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future-substance abuse. (Check if applicable.)

XX The defendant shall not possess a firearm as defined in 18 U.S.C. 921. (Check, if applicable.)

If this judgment imposes a line or a restitution obligation, It shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the

commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

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5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons:

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

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9) the defendant shall not associate with any persons engaged In criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer:

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OF SUPERVISED RELEASE

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Defendant shall cooperate with and arrange with the Internal Revenue Service to pay all past and present taxes and penalties owed, and file timely, accurate and lawful income tax returns and show proof of same to the probation officer. Defendant, shall, within ninety (90) days, file correct and accurate income tax returns for the years 1994 and 1995.

Defendant shall make restitution in the amount of $141,812.75, to be paid jointly and severally with co-defendant Nanja Rutherford. Said restitution shall be payable, in full, within six (6) months after his release from incarceration.

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Defendant shall pay a fine in the amount of $3,000, individually, payable within six (6) months after his release from incarceration.

Defendant shall pay costs of prosecution in the amount of $2,637.00, payable jointly and severally with the co-defendant Nanja Rutherford, and payable within, six (6) months after his release from incarceration.

Defendant shall provide the probation officer access to any requested financial information, including personal income taxes, authorization for release of credit information, and any other business financial information in which the defendant has a control or interest.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B;

	Assessment	Fine	Restitution
TOTALS	$ 75.00	$ 3,000.00	$

Dated this 2 day of March, 2001
EDWARD C. REED, JR, SENIOR USDJ

SCHEDULE OF PAYMENTS

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Dated this 2 day of March, 2001
EDWARD C. REED, JR., SENIOR USDJ

STATEMENT OF REASONS

XX The court adopts the factual finding and guideline application in the presentence report except (see attachment, if necessary): SEE TRANSCRIPT

Guideline Range Determined by the Court:

Total Offense Level: 12
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Fine Range: $ 3,000 to$ 30,000

Total Amount of Restitution: $ 141,812.75 jointly & severally with co-defendant

XX The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

Dated this 2 day of March, 2001
EDWARD C. REED, JR., SENIOR USDJ

No. 01-10164, No. 01-10172

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

NANJA RUTHERFORD,
Defendant - Appellant.

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

MARTIN RUTHERFORD,
Defendant - Appellant.

Filed May 30, 2002

ORDER

Before: BRUNETTI, LEAVY and T.G. NELSON, Circuit Judges

The panel has voted to deny appellants' petition for rehearing. Judge T.G. Nelson has voted to reject the suggestion for rehearing en banc and Judge Brunetti and Judge Leavy so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.